Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-1168

MARK LEWIS CONSTANTINE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

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February 17, 1978

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. _____

MARK LEWIS CONSTANTINE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
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The petitioner, Mark Lewis Constantine, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in which Petition for Rehearing was denied on January 20, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit appears in the Appendix marked Exhibit "A". Also

appearing in the Appendix, marked Exhibit "B" is the opinion rendered by the District Court for the Southern District of West Virginia.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 14, 1977. An extension of time to file a Petition for Rehearing was granted until January 28, 1978. The Petition for Rehearing was filed January 12, 1978 and was denied January 28, 1978. This Petition for Writ of Certiorari was filed within thirty (30) days of that time. This Court's jurisdiction is invoked under 28 U.S.C. para. 1254 (1).

QUESTIONS PRESENTED

1. Should the investigative stop limitations set forth in Terry v.

Ohio, 392 U.S. 1 and United States v. Brignoni-Ponce, 422 U.S. 873 be significantly extended?

2. Where petitioner is stopped and summoned across the street to a cruiser by a city policeman on a downtown street one block from petitioner's residence in the early morning hours because he is a "new face", does the police officer have sufficient justification to reach inside petitioner's jacket and remove a bag containing a greenish substance? Coolidge v. New Hampshire, 403 U.S. 443.

3. Does the officer, having seized the greenish substance, have the legal right to arrest and search petitioner on the spot there being no danger to the officer's safety involved? Almeida-Sanchez v. United States, 413

U.S. 266.

4. Are the fruits of such a search, namely an ounce of cocaine, found deep in the inside jacket pocket, admissible in evidence against petitioner? Beck v. Ohio, 379 U.S. 89, Coolidge v. New Hampshire, 403 U.S. 443.

5. Does the balance of the public interest against Fourth Amendment guarantees require that a person may be stopped and summoned for field investigation without some probable cause for stopping that person?

STATEMENT OF THE CASE

The Fourth Circuit reversed the District Court which had suppressed evidence. Defendant was stopped at 1:40 A.M. in downtown Huntington, West Virginia within a block of his residence and summoned across the street

to a police cruiser because he was a "new face" to a cruising patrolman. The 23 year old petitioner was manager of a Huntington department store. The patrolman demanded identification. As the defendant stood at the patrolman's cruiser in response to the officer's summons, the officer reached inside defendant's open blue ski jacket and removed a small plastic bag six inches long from an inside pocket 6 3/4 inches deep. The officer testified he seized the bag containing a green substance "for closer examination". He then placed defendant under arrest, searched him and found hidden deep inside the same pocket an ounce of cocaine.

At a preliminary hearing, the officer testified that he had had some

reports of someone shooting a pellet gun at windows in an area some five to eleven blocks from where petitioner was stopped and summoned to the patrol car.

Nowhere in the very short record of the preliminary hearing did the officer state or even infer that he had "reasonable suspicion" that petitioner might be involved in criminal activity.

Although the Fourth Circuit in its opinion states otherwise, we find no statement or inference in the officer's testimony that petitioner was observed, stopped and summoned to the cruiser, in an area which had a disposition toward criminal activity.

Nor does the police officer state that petitioner in any way whatever exhibited any suspicious or "circum-

ambient activities" before the officer.

When petitioner's counsel raised objections under both the Fourth Amendment and Section 6, Article 3, Constitution of West Virginia, the prosecutor representing the state dismissed the charges while the federal drug enforcement agency simultaneously arrested and charged petitioner with violating 21 U.S.C. 841 (a)(1) - Possession with intent to distribute - Schedule II Narcotic controlled substance, Cocaine. Motion was timely made to suppress the purported cocaine, which motion was sustained. The government appealed this action by the trial court to the circuit court of appeals before trial had been held. The circuit court reversed and remanded for trial. This is an attempted appeal

from that decision.

REASONS FOR GRANTING THE WRIT

1. The decision of the Fourth Circuit Court is in conflict with the decisions of this Court in the application of the exclusionary rule in Fourth Amendment search and seizure cases. Harris v. United States, 390 U.S. 234, 236 and Coolidge v. New Hampshire, 403 U.S. 433, hold that an arresting officer who comes within plain view of a piece of evidence not concealed, may seize it but only so long as the plain view was obtained in the course of an appropriately limited search of the arrestee or supplemented by prior justification, whether it be warrant for another object, hot pursuit, search incident to lawful arrest or such other legitimate reason

for being present. We believe the officer in the instant case had none of those justifications for his stopping petitioner and summoning him to his police cruiser.

Terry v. Ohio, 392 U.S. 1 holds that there must be a pattern of conduct which would give rise to an inference by a reasonable person that the defendant was violating the law or about to violate the law before an officer may approach the defendant and pat him down for weapons.

United States v. Brignoni-Ponce, 422 U.S. 873, states that a roving patrol stop must be a result of the officer's being "aware of specific articulable facts, together with rational inferences from these facts, that reasonably warrant suspicion." In the in-

stant case, there was nothing that would give rise to a rational inference that petitioner had been involved in or about to be involved in criminal activity.

This Court was extremely careful to emphasize the reasonable suspicion necessary to justify a stop. This Court suppressed evidence holding that a stop and search of a moving automobile can be made without a warrant but, there must be probable cause. Almeida-Sanchez v. United States, 413 U.S. 266.

In Coolidge v. New Hampshire, 403 U.S. 443, this Court reiterated the doctrine that searches and seizures conducted outside judicial process, without prior approval by a judge or magistrate, are per se unreasonable

under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions which are jealously and carefully drawn. In that case the permitted seizure of the evidence in plain view had to be supplemented by prior justification whether it be warrant for another object, hot pursuit, search incident to lawful arrest or some other legitimate reason for being present. Plain view alone was not enough to justify a warrantless seizure of the evidence. No amount of probable cause can justify a warrantless search or seizure in the absence of exigent circumstances.

The Fourth Circuit's allowing the use of the evidence in the case at bar extends exigent circumstances to

a virtually unlimited extent. We believe that this case goes far beyond the limits set by this Court in Adams v. Williams, 407 U.S. 143, Sebron v. New York, 392 U.S. 40 and United States v. Watson, 423 U.S. 411.

2. This decision by the Fourth Circuit Court of Appeals is in conflict with the decisions of other federal courts of appeal as to the application of the Fourth Amendment. The following cases decided by the circuit courts on similar fact and law patters are illustrations, we believe, indicating that had this case been appealed to the Fifth, Eighth, Ninth or District of Columbia Circuits, the trial court's exclusion of the evidence would have been upheld:

a. United States v. Frisbie, 21 Cr. L. 2123 (Fifth Cir., 5-11-77). A truck was stopped in the early morning hours. The truck's direction, the likelihood that it came from an unpatroled river area, the driver's difficulty in stopping and the partially populated area where the stop occurred and the officers' knowledge that vehicle traffic did not normally travel the roads at such early hours and that the route was frequently traveled by smugglers, primarily in thr late evening and early morning hours, were all reasons why the government claimed probable cause. The circuit court suppressed the evidence citing Brignoni holding that a reasonable suspicion was necessary. The court stated that the residents of border

areas would be subject to potentially unlimited interference with their use of the highways and that a traveler's decision to travel at off hours should not subject him to a stop.

b. United States v. Miller, 546 F 2d 251 (May, 1977, Eighth Cir.). Defendant was a guest in a legally searched house. He was detained ten minutes and refused permission to leave. His sitting with his shirt tail out caused officers to suspect he might be armed. He was patted down revealing a gun. The circuit court held the gun should be suppressed, that there was not sufficient probable cause to search him or pat him down.

c. United States v. Morrison,

546 F 2d 319 (May, 1977, Ninth Cir.). Border agents saw the defendant's car on a highway, two and a half miles from the border in a notorious smuggling area. They order him to stop. Defendant's subsequent activities or acts caused a search revealing marijuana. The court held the stop must be valid when made. The evidence is suppressed.

d. United States v. Montgomery, 21 Cr. L. 225 (May 26, 1977, C.A. D.C.). Defendant was stopped by two officers in violation of Fourth Amendment. Defendant aroused their suspicions by encircling a residential area but they had no articulable facts on which to base these suspicions. Thus, illegal firearms discovered in a sequence of events

touched off by the illegal stop were excluded from evidence.

These are just a few of the dozens of cases on point, in our opinion, showing a conflict among the courts of appeal on the application of the exclusionary rule.

CONCLUSION

The decision at bar extends the Terry, Brignoni-Ponce and Almeida-Sanchez decisions to such an extent that it is a virtual emasculation of the exclusionary rule.

There is hardly any time, we have ascertained, when an officer on a city beat cannot testify that there was some minimal criminal activity reported to him. Is this, together with seeing a new face on his beat sufficient and probable cause to

permit an officer to make a stop and summon the petitioner to his cruiser? Does this put the officer in a justifiable position to reach inside the petitioner's coat to seize what the officer believes might be marijuana? Does this activity, when the officer does not testify that he was in any fear or need of self-protection permit a search of petitioner? Does the officer have any probable cause whatever, when he must view the commission of a misdemeanor in order to arrest without a warrant?

We respectfully submit that allowing this decision to stand will, after the decision is published, create a virtual immunity for any law officer

from the exclusionary rule requirements of the Fourth Amendment.

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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February 17, 1978

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EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1604

UNITED STATES OF AMERICA, Appellant,

v.

MARK LEWIS CONSTANTINE, Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington Charles H. Haden, II, District Judge

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Argued 10-6-77 Decided 12-14-77

Before Bryan, Senior Circuit Judge, Russell and Widener, Circuit Judges.

E. Leslie Hoffman, III, Assistant United States Attorney (John A. Field, III, United States Attorney on brief) for Appellant; Roger Turrell (William L. Redd on brief) for Appellee.

PER CURIAM:

Mark Lewis Constantine was arrested and indicted for possession of cocaine with the intent to distribute it. 21 U.S.C. 841 (a)(1). On March 7, 1977, the District Court granted the defendant's pretrial motion to suppress as evidence against him the cocaine seized by the police officer at the time of the arrest. From this order the government appeals. 18 U.S.C. 3731. We reverse, finding the seizure justifiable and the evidence admissible at trial.

Assigned to the midnight patrol shift, Officer Damon Sloan of the Huntington, West Virginia Police Department, was investigating a rash of window breakings and vandalisms committed in the downtown area. Around 1:40 A.M. on November 24, 1976, the

officer observed Constantine leave his car, walk to a parked van with Ohio license plates and talk to the driver. Sloan drove a short distance beyond, then decided to return to where he had seen Constantine. Sloan was generally familiar with the people who frequented this part of Huntington late at night, but had never seen the defendant previously and no one else was on the street. Nearing him the patrolman stopped his car and motioned to the defendant, who was standing across the street, to come to the car. The officer's intention was to check for identification, to ask where Constantine had been and to ascertain why he was on the street at that late hour.

Constantine complied with the officer's request and walked over to the patrol

car and leaned down to talk to the officer through the window. Sloan could then see a plastic bag containing a greenish, leafy substance protruding from a pocket inside Constantine's open ski jacket. The officer, recognizing the substance as apparently marijuana, reached through the window and into the pocket, removed the bag and found it did contain marijuana. Whereupon he got out of his vehicle, placed Constantine under arrest for possession of marijuana, at the same time informing him of his Constitutional rights. The defendant was searched at the arrest site and a bag containing cocaine was found in his pocket.

We hold that the officer was then pursuing his duty, in that he was

investigating crime in the area when he asked Constantine to approach the car and identify himself. In these circumstances the public interest must, of course, be weighed with the intrusion upon individual liberty, the result of stopping the pedestrian. Obviously, the interference here was no more than modest. The question is one of fact and each incident necessarily turns on its own peculiar facts.

In Terry v. Ohio, 392 US 1, 21 (1968). The Court found that the governmental concern in curtailing crime would permit a police officer in appropriate circumstances to "approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."

Id. at 22. The Court in United States v. Brignoni-Ponce, 422 US 873 (1975) held that probable cause was not required for a brief investigative stop of a car suspected of transporting illegal aliens. It said that a reasonable suspicion that the car contained illegal aliens would support this "minimal intrusion". Id. at 881.

The minimal intrusion of an investigative stop is Constitutionally permissible if "the police officer (can) point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 US at 21. See United States v. Brignoni-Ponce, 422 US at 884. Officer Sloan's investigative stop is consistent with

this criterion. See United States v. Bull, No. 77-1315 (4 Cir. November, 1977).

Assessing the need for a brief stop, "the circumstances before (the officer) are not to be dissected and viewed singly; rather they must be considered as a whole."
United States v. Hall, 525 F 2d 857, 859 (D.C. Cir. 1976). Officer Sloan knew the section where he observed Constantine had a high incidence of vandalism. An area's disposition toward criminal activity is an articulable fact. United States v. Brignoni-Ponce, 422 US at 884-885. The mood of the precinct and the circumambient activities before Officer Sloan "are to be viewed through the eyes of a reasonable and cautious

police officer on the scene, guided by his experience and training". United States v. Hall, 525 F 2d at 859. See United States v. Magda, 547 F 2d 756, 758 (2 Cir. 1976).

The order appealed from is reversed, and the case remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

EXHIBIT B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA HUNTINGTON

UNITED STATES OF AMERICA, Plaintiff

v.

MARK LEWIS CONSTANTINE, Defendant

Criminal No. 77-30002

ORDER

On the 7th day of March, 1977, came the United States of America, by its counsel, E. Leslie Hoffman, III, Assistant United States Attorney for the Southern District of West Virginia, and the defendant Mark Lewis Constantine, by his counsel, William L. Redd and Roger Turrell, an attorney appearing for the defendant in this matter only, upon the defendant's motion to suppress evidence.

The Court, after argument of counsel

in support of the said motion, and argument in opposition to said motion, and upon mature consideration of the facts herein, including, but not limited to, the transcript of the preliminary hearing in this matter conducted before the magistrate on January 13, 1977, is of the opinion to, and does hereby, grant the said motion to suppress.

In elaborating on the Court's oral ruling of March 7, 1977, this Court is of the opinion that the police officer did not have legal justification to stop Constantine. As stated in Terry v. Ohio, 392 U.S. 1, 21 (1968), "in justifying the particular intrusion the police officer must be able to point to specific articulable facts which, taken

together with rational inferences from those facts, reasonably warrnt the intrusion." The reasons given by the officer for the stop was that there had been some vandalism reported, that he had never seen Constantine before on his "beat", and that it was 1:30 A.M.

The Court finds nothing significant about a man being on a downtown Huntington street at 1:30 A.M. The fact that the officer had never seen Constantine is also insignificant, particularly in view of the fact that Constantine lived less than a block away from the point of the stop. Finally, the vandalism occurred several blocks from this area and there appeared no "specific and articulable" facts to link Constantine

in any way with the vandalism. Therefore, when the officer did see the bag containing marijuana, he was not in a justifiable position to do so. See Harris v. United States, 390 U.S. 234, 236 (1968).

Accordingly, it is ORDERED that the evidence seized pursuant to a search of the defendant Mark Lewis Constantine, be, and the same is, hereby suppressed, and it is ORDERED that such evidence may not be introduced against the defendant at trial.

Whereupon the United States, by counsel, moved the Court to continue this matter generally in order to allow the government to prosecute an appeal pursuant to the provisions of Title 18, United States Code, Section 3731.

The Court is of the opinion to,

and does hereby, grant said motion to continue this case generally.

WHEREFORE IT IS ORDERED that this case be, and the same is, hereby continued generally.

The Clerk is directed to send a certified copy of this order to all counsel of record.

ENTER: 3/12/77

/s/ Charles H. Haden, II
Charles H. Haden, II
United States
District Judge

CONSTITUTION OF THE UNITED STATES
AMENDMENT (IV)
(SEARCHES AND SEIZURES)

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cuase, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C. 20530 and three copies to E. Leslie Hoffman, III, Assistant United States Attorney, United States District Court, Charleston, West Virginia 25301. I further certify that all parties required to be served have been served.

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